SUPREME COURT, U. S.

No. 503

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*,

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August 16, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on March 27, 1967 in *Standard Oil Company of Texas, et al.* v. *Federal Power Commission,* Tenth Cir. Nos. 9289, *et al.*

OPINIONS BELOW

The opinion of the court of appeals (FPC Pet. 9-13)[1] is reported at 376 F.2d 578, and its opinion on rehearing, entered May 18, 1967 (*infra,* Appendix pp. 1a-3a),

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[1] "FPC Pet." refers to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission in No. 80, this Term (originally No. 1227, O.T. 1966).

is reported at 376 F.2d 580. The opinion and order of the Federal Power Commission are reported at 36 FPC 309.

JURISDICTION

The judgments of the court of appeals (FPC Pet. 14-21) were entered on March 27, 1967, and rehearing was denied by the court of appeals on May 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Where the Federal Power Commission, having issued *ex parte* temporary certificates to producers pending hearing and disposition of their certificate applications, determines after full hearing on those applications that the prices collected pursuant to the temporary certificates were out of line and not consistent with the public convenience and necessity, does the Commission have the power and the duty to require the producer applicants to refund the excess amounts collected under the temporary certificates?

STATEMENT

In August of 1962, the Federal Power Commission consolidated and set for hearing thirty-eight producer applications for certificates of public convenience and necessity to sell gas for resale in interstate commerce. All of the applications proposed sales from the lower Texas Gulf Coast (Texas Railroad Commission District No. 4); all of the applicants proposed initial prices ranging from 15.9¢ to 19.8¢ per Mcf; and either before the hearings commenced or shortly thereafter each applicant was issued a temporary certificate au-

thorizing commencement of the sale at the proposed initial price pending outcome of the hearings.

In March of 1964, the Federal Power Commission entered an order (1) holding that the in-line price for these proposed sales was 16¢ per Mcf and that certificates should issue at that level, and (2) deferring for later disposition resolution whether and to what extent refunds should be ordered of excess amounts collected pursuant to the temporary certificates pending conclusion of the proceedings, *Amerada Petroleum Corp.*, Op. 422, 31 FPC 623.

Appeals from Opinion No. 422 were taken both by the producer applicants and by the consumer interests (including present petitioners), who had intervened in the FPC proceedings. A producer petition filed with the U.S. Court of Appeals for the Tenth Circuit was deemed the first filed petition and all cases were transferred to that court. In December 1966, the Tenth Circuit sustained the Commission's in-line finding of 16¢ per Mcf, but held that the Commission was without power to order refunds of the excess amounts collected by the producers under the temporary certificates, *Sunray DX Oil Co.* v. *F.P.C.*, 370 F.2d 181. Petitions, filed by the instant petitioners,[2] the FPC,[3] and others,[4] for a writ of certiorari to review the *Sunray* judgment are presently before this Court.

While the appeal from FPC Opinion No. 422 was pending before the Tenth Circuit, the Commission, in

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[2] *Brooklyn Union Gas Co. et al.* v. *F.P.C. et al.*, No. 62, this Term (originally No. 1135, O.T. 1966).

[3] *F.P.C.* v. *Sunray DX Oil Co.*, No. 60, this Term.

[4] *United Gas Improvement Co.* v. *Sunray DX Oil Co.*, No. 61, this Term; *Texaco Inc.* v. *F.P.C.*, No. 82, this Term.

July 1966, acted on the refund issue deferred by Opinion 422. In essence, the Commission directed refunds of all amounts collected by the producers under their temporary certificates in excess of the in-line price of 16¢, with the exception of certain royalty payments and taxes, *Amerada Petroleum Corp.*, Op. 501, 36 FPC 309. The producers again petitioned for review in the Tenth Circuit and, on producer motion for summary disposition, that court, by per curiam order entered March 27, 1967, set aside Opinion No. 501 on authority of its December 1966 opinion in the earlier stage of these proceedings.

REASONS FOR GRANTING THE WRIT

The question raised by the instant petition is identical to Question No. 2 of our petition to review the Tenth Circuit's December 1966 decision in the earlier proceedings of this case, *Brooklyn Union Gas Co. et al. v. F.P.C. et al.*, No. 62, O.T. 1967. Our reasons for urging certiorari here are identical with our reasons in No. 62. Accordingly, we would respectfully refer the Court to pages 17-23 of our earlier petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 16, 1967

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 9227, 9287, 9289, 9308, 9310, 9311, 9315, 9316, 9317, 9318, and 9319

March Term, 1967

SUNRAY DX OIL COMPANY, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

[Filed: United States Court of Appeals, Tenth Circuit, May 18, 1967, William L. Whittaker, Clerk.]

On Rehearing

[May 18, 1967]

PER CURIAM.

The petitioners in Nos. 9227, 9287, 9308, 9310, 9311, 9315, 9316, 9317, 9318, and 9319 and the intervenors Texaco Inc., Sunray DX Oil Company, Humble Oil & Refining Company, Lamar Hunt, Sohio Petroleum Company and Sun Oil Company in No. 9289 have filed petitions for rehearing asking that the judgments of reversal and remand entered on March 27, 1967, be vacated and that all the cases be held in abeyance pending Supreme Court review of No. 7781, Sunray DX Oil Company, et al. v. Federal Power Commission.

These cases all seek review of Federal Power Commission Opinions Nos. 501 and 501-A ordering refunds of

amounts collected under unconditioned temporary certificates in excess of the price established in Opinion No. 422. We reversed and remanded all the cases by an opinion filed in No. 9289, Standard Oil Company of Texas v. Federal Power Commission, —— F. 2d ——, and by orders entered in the other cases in accordance with that opinion. This action was taken because we had previously held that the Commission did not have the power to order such refunds.

These cases all concern (1) the power of the Federal Power Commission to order the refunds and (2) the manner of the exercise of that power. The Commission represented to us that the issue of power was severable from the issue of the exercise of the power and urged us to make summary disposition of the power issue because the same question was decided by our opinion in No. 7781, Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 370 F.2d 181, which is now pending in the United States Supreme Court on the Commission's petition for certiorari. In the belief that prompt disposition of these cases would be proper and might aid in the resolution of the question by the United States Supreme Court because these cases present no jurisdictional problem although the Sunray DX case now pending on application for certiorari has jurisdictional questions raised by the Commission, we disposed of all of them by an opinion rendered in No. 9289, Standard Oil Company of Texas v. Federal Power Commission, and by appropriate orders entered in the other cases on the authority of that opinion. In so doing we expressly stated that we made no decision on the propriety and validity of the exercise of the power.

The petitions for rehearing assert that the Commission in its application for certiorari in our No. 9289 said that in the event certiorari was granted it reserves "the right to argue additionally that the Commission reasonably exercised its power in directing the refunds which it ordered in these proceedings." This action is said to be a change

of position which deprives the petitioners of their right to be heard in this court on the exercise of the power. The ambivalence of the Commission is something beyond our control. We adhere to our view that we are not concerned with the exercise of a nonexistent power. If it should be held on Supreme Court review that we are wrong in our decision as to the existence of the power, we are ready to consider then the manner of the exercise of the power.

The petitions for rehearing and for stay of mandate are severally denied.

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v.

STANDARD OIL COMPANY OF TEXAS, a Division of Chevron Oil Company, ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, GEORGE H. COATES, PATCHIN-WILMOTH INDUSTRIES, INC., AND CLARK FUEL PRODUCING COMPANY

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September 1, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 503

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners,*

v.

STANDARD OIL COMPANY OF TEXAS, a Division of Chevron Oil Company, ET AL., *Respondents.*

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BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, GEORGE H. COATES, PATCHIN-WILMOTH INDUSTRIES, INC., CLARK FUEL PRODUCING COMPANY

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Tenth Circuit setting aside the Federal Power Commission's Opinion Nos. 501 and 501-A and the opinion on rehearing of that court are reported at 376

F. 2d 578, 580. These opinions of the court below have been printed as Appendix A to the brief in opposition of the undersigned Respondents in Nos. 80 and 97 (O.T. 1967).[1] The Commission's Opinion No. 501 is reported at 36 FPC 309.

JURISDICTION

The judgments of the court below were entered on March 27, 1967 (Pet. No. 80, App. B, pp. 14-21). Rehearing, sought only by the undersigned Respondents, was denied on May 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The question presented by this petition (No. 503) is identical to Question No. 2 presented by these same petitioners in No. 62, this Term (originally No. 1135, O.T. 1966). That question seeks review of the Tenth Circuit's determination that the Commission lacked the power, in the circumstances presented, to require retroactively the refund by Respondents of amounts collected pursuant to temporary certificates of public convenience and necessity which did not even suggest the possibility of such refund impositions. Indeed, the Commission itself expressly negated the possibility of such impositions in its subsequent order (29 FPC 218).

The court below had previously determined that the Commission lacked such refund power in the identical circumstances when it reviewed the Commission's

[1] The petitions in Nos. 80 and 97, filed by the Commission and The United Gas Improvement Company in April 1967, seek review of these same opinions of the court below.

Opinion Nos. 422 and 422-A[1] in *Sunray DX Oil Company, et al.* v. *Federal Power Commission*, 370 F. 2d 181 (10th Cir. 1966). A petition for a writ of certiorari seeking review of that question has already been filed by these same Petitioners in the pending *Sunray* litigation (No. 62, O.T. 1967).[2] The undersigned Respondents have filed answers in opposition to that petition.

The refund power question presented here and by Nos. 60, 61 and 62 is:

> May the Commission retroactively order refunds of amounts collected under lawfully issued temporary certificates when, pursuant to legal precedent and its established policies, the Commission determined both at the time of issuance of such certificates and upon subsequent reconsideration that no refund liabilities should be imposed?

STATUTES INVOLVED

The pertinent provisions of Section 7 of the Natural Gas Act, 15 U.S.C. 717(f), are set forth in the Commission's pending petition in No. 80 (pp. 2-3).

STATEMENT

In *Sunray DX Oil Company, et al.* v. *Federal Power Commission, supra,* the Court of Appeals for the Tenth Circuit held in a carefully considered opinion that the Federal Power Commission lacked the power,

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[1] *Amarada Petroleum Corporation, et al.*, Opinion Nos. 422 and 422-A, 31 FPC 623, 1315 (1964).

[2] The *Sunray* litigation is before this Court by virtue of the petitions in Nos. 60, 61 and 62. Viewed together, these three petitions present not only the identical refund power question raised here but an additional question concerning the propriety of the Commission's "price line" determination which was affirmed by the court below in *Sunray*.

in the circumstances presented, to order Respondents to refund amounts which they had collected in accordance with Commission orders granting temporary certificates.[1] In March 1967, The Brooklyn Union Gas Company, *et al.* (Brooklyn Union), filed a petition for a writ of certiorari seeking review of the Tenth Circuit's *Sunray* decision on the refund issue. In that same petition, Brooklyn Union also sought review of the Tenth Circuit's holding in *Sunray* that substantial evidence supported the Commission's 16.0 cent price line determination (No. 62).[2] Respondents answered in opposition to the request for certiorari in that case as well as the related petitions in Nos. 60 and 61.

Subsequently, in accordance with the position taken by the Commission and without briefing or oral argument, the Tenth Circuit issued its *per curiam* decision below setting aside the Commission's Opinion Nos. 501 and 501-A on the basis of its prior *Sunray* holding.

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[1] The petition in No. 503 is factually erroneous and misleading in stating (at pp. 2-3) that "... applicants proposed initial prices ranging from 15.9¢ to 19.8¢ per Mcf ..." and that "... each applicant was issued a temporary certificate authorizing commencement of the sale at the proposed initial price pending the outcome of the hearings." The sale referred to by Petitioners as having an initial rate of 19.8¢ per Mcf was authorized under the Commission's temporary certificate power to be made only at the 18¢ per Mcf guideline rate previously established by the Commission in its *Statement of General Policy No. 61-1*, 18 CFR 2.56(a), 24 FPC 818 (1960). The Commission did not issue a temporary certificate to any Respondent authorizing an initial rate higher than its 18¢ per Mcf guideline level.

[2] Petitions for certiorari were also filed by the Federal Power Commission (No. 60) and by The United Gas Improvement Company (No. 61).

As a protective measure, the Commission and The United Gas Improvement Company filed second petitions for certiorari seeking review of the Tenth Circuit's *per curiam* application of its *Sunray* holding (Nos. 80 and 97). Despite the fact that the Tenth Circuit had not addressed itself to the complex subsidiary issues involving the manner in which the Commission had exercised its claimed refund authority, both the Commission and The United Gas Improvement Company have requested this Court to review in the first instance the multi-issue question of whether the Commission had properly exercised the disputed refund power. Respondents opposed the grant of certiorari in Nos. 80 and 97 for the reasons they had previously expressed in opposing certiorari in Nos. 60, 61 and 62. Additionally, Respondents pointed out that the many complex issues involved in the question of the Commission's exercise of the refund power, not passed upon by the court below, should not be entertained and, consequently opposed the requested consolidation of Nos. 80 and 97 in the event review were granted in Nos. 60, 61 and 62 (Respondents' red brief in opposition, Nos. 80 and 97, pp. 7-12).

Brooklyn Union has now filed its protective petition for certiorari seeking review of the Tenth Circuit's *per curiam* application of its *Sunray* holding. Unlike petitioners in Nos. 80 and 97, however, Brooklyn Union has limited the question presented to whether the Commission has the power to order refunds in the circumstances and properly has not sought consolidation of the instant petition with Nos. 60, 61 and 62.

REASONS FOR DENYING THE WRIT

The question presented by No. 503 is a *verbatim* duplication of Question No. 2 raised by these same Petitioners in No. 62, pending before the Court. Petitioners state that their reasons for urging grant of certiorari here on the refund power question are identical to those stated in the pertinent portion of their pending petition in No. 62. Consequently, as reasons for denial of a writ here, the undersigned Respondents adopt the reasons previously stated in their briefs in opposition filed in Nos. 60, 61 and 62.

In any event Respondents respectfully request that the instant petition in No. 503, as well as the petitions in Nos. 80 and 97, be held to abide the Court's final disposition of the pending petitions in Nos. 60, 61 and 62 filed in the *Sunray* litigation. Such disposition would be wholly consonant with the Commission's position below and the Tenth Circuit's explicit reliance upon its prior *Sunray* decision. (376 F. 2d 578 at 581; see also Respondents' red brief in opposition, Nos. 80 and 97, p. 6). Further, this would not be detrimental to these Petitioners and, hopefully, would lighten the burden of the Court.

CONCLUSION

The petition for a writ of certiorari should be denied. In the event that the Court should grant the petition filed by these same Petitioners in No. 62 and the companion petitions in Nos. 60 and 61, the instant petition should be held to abide the Court's final disposition in Nos. 60, 61 and 62.

Respectfully submitted,

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September 1, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

THE BROOKLYN UNION GAS CO. ET AL. *v.* STANDARD OIL CO. OF TEXAS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 503. Decided May 20, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Federal Power Commission* v. *Sunray DX Oil Company*, 391 U. S. —.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.